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## **Paying the Piper: The Cost of Compliance with the Federal Sex Offender Registration and Notification Act**

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*New York Law School, 2014*

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JENNIFER N. WANG

## Paying the Piper: The Cost of Compliance with the Federal Sex Offender Registration and Notification Act

59 N.Y.L. SCH. L. REV. 681 (2014–2015)

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## PAYING THE PIPER: THE COST OF COMPLIANCE WITH SORNA

*Every piece of sex offender legislation has a compelling political backstory. No different is the Sex Offender Registration and Notification Act of 2006 (SORNA), which aims to build a comprehensive national sex offender registry in the United States. However, lost in the passionate determination to eliminate sexual crime is a rational cost-benefit analysis of state compliance. This note describes the long-standing problem of compliance with SORNA and identifies cost as a key contributor to state noncompliance. With the principal purpose of SORNA in mind, this note then proposes different approaches to addressing the financial barriers to SORNA and evaluates each response in light of compliance. Ultimately, this note calls for a change of focus in the way that politicians and legislators look at implementing SORNA, as well as other sex offender legislation in the United States.*

### I. INTRODUCTION

Eleven days into trial, former New York Governor George E. Pataki was on the witness stand.<sup>1</sup> At 6 feet, 5 inches, Pataki—even while seated—exuded an impressive presence that was felt by the courtroom’s attentive listeners. Pataki’s lawyer, Abbe Lowell, prompted his client to describe a “personal incident” to the jury, and Pataki responded:

My wife and I would always . . . go hiking in the state parks where we live, and we went for a hike with my youngest child, my son, and three or four neighbor kids and another neighbor. Sometime in either '95 or '96, in thousands of acres of wilderness, there was one individual, a male who, when no one else was around, would continually stand and walk right next to us, and we would even go off the trail for a view. He would walk right out and stand next to the kids. I was a governor, so the State Police were down the trail, so I called them and the State Police came, and they started asking the man why he was following us and following the children.

I was advised later on that he . . . had been convicted of sexual crimes in the Rochester area.<sup>2</sup>

Pataki went on to explain that the incident brought to his attention “not just . . . the horrors of these [sexual] crimes, but the immediacy of the[ir] possibility.”<sup>3</sup>

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1. Much of the anecdote that follows is based on my own observation. From June to August 2013, I served as a legal intern in the Litigation Bureau of the Office of the New York State Attorney General. During my internship, I worked exclusively on *Bailey v. Pataki*, 708 F.3d 391 (2d Cir. 2013). The *Bailey* trial began on July 9, 2013, and concluded with the jury’s verdict on July 31, 2013. Judge Jed S. Rakoff of the U.S. District Court, Southern District of New York, presided.

2. Transcript of Trial at 2113, *Bailey v. Pataki*, No. 08-CV-8563 (S.D.N.Y. July 23, 2013).

3. *Id.* at 2113–14. Pataki told the jury: “I had [state] troopers, but I couldn’t help but think of a mother in a walk in the park with a child or a child at a playground . . .” *Id.* at 2113.

In 2008, the plaintiffs in *Bailey v. Pataki* filed a complaint against the former governor and a number of other high-ranking New York State executives.<sup>4</sup> The six convicted sex offenders claimed that their constitutional due process rights were violated when the Pataki administration implemented the Sexually Violent Predator Initiative (“SVP Initiative”) in 2005.<sup>5</sup> Specifically, the plaintiffs alleged that they were unlawfully confined to state mental hospitals at the conclusion of their prison sentences for committing sexually violent crimes.<sup>6</sup>

Along with Pataki, five of the six plaintiffs testified when the case went to trial in August of 2013.<sup>7</sup> During plaintiff Robert Warren’s cross-examination, he was questioned about his sex offender registration status:

Q. Mr. Warren, you are required to register as a sex offender in the State of New York, right?

A. Well, that depends on the state I have residency. Wherever you reside, that’s where you’re required to register. So I reside here right now, so I register here. If I moved to Oregon, when I have been there, I [was] required to register in Oregon and not in New York.

Q. You are currently registered in Oregon. Is that true?

A. I am currently registered in New York.

Q. And information concerning your Sex Offender Registry is available to the public, isn’t it . . . ?

A. Not in Oregon, it is not. In Oregon, it is not.

Q. In New York it is?

A. I think so, yes. I am not a resident of New York State right now.<sup>8</sup>

Plaintiff Louis Massei was also questioned about his registration status as a sex offender:

Q. Now, Mr. Massei, as a result of your rape conviction, you’re required to register under the Sex Offender Registration Act. Is that true?

A. That is correct, too.

Q. As a result of having to register, you have to register your address at least once a year with Albany. Is that correct?

A. No. I don’t live in New York. I don’t register with Albany.

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4. See Amended Complaint for Damages, *Bailey v. Pataki*, No. 08-Civ-8563 (S.D.N.Y. Jan. 22, 2009).

5. See Amended Complaint for Damages, *supra* note 4, at 1–3; see also Benjamin Weiser, *At Trial, Pataki Says Sex Offender Trailed Family*, N.Y. TIMES, July 24, 2013, at A18, available at <http://www.nytimes.com/2013/07/24/nyregion/in-trial-over-confinement-pataki-says-sex-offender-trailed-his-family-on-hike.html>.

6. See Weiser, *supra* note 5. Plaintiffs’ main claim was that their procedural due process rights were violated when they were committed without: notice, psychiatric examinations by court-appointed physicians, or a judicial hearing prior to commitment. See *Bailey*, 708 F.3d at 398.

7. Plaintiff Jorge Burgos was deceased at the time of trial and was thus unable to testify.

8. Transcript of Trial, *supra* note 2, at 1472–73.

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Q. You have to register where you live?

A. Right.

Q. You have to register at least once a year?

A. Yes.

Q. If you move, you have to provide them with a new address?

A. Whenever I move, I just provide them with whatever address I live at.

Q. And information relating to your conviction is available to the public?

....

A. In the State of New York, my information is available. Because I live in the State of North Dakota, and I wasn't convicted under their system, I am not listed on their system because I was not given a level hearing. I am not listed where I live. I am listed in New York. In North Dakota if someone wants to know about me, they put me in the system. I don't come up as a sex offender in the State of North Dakota or Oregon.

THE COURT: We get the idea.<sup>9</sup>

The plaintiffs' testimony during the *Bailey* trial revealed the complexity and possibility for error in a fragmented sex offender registration system comprised of fifty individual states, the District of Columbia, the five principal U.S. territories, and Indian tribes.<sup>10</sup> What are the cracks in the system and how often do these breakdowns occur? I was curious, and commenced a line of research to learn the nature and structure of sex offender registration and notification in the United States.

In addition to government programs such as the SVP Initiative, sex offenders are regulated by extensive federal and state legislation.<sup>11</sup> One of these laws is the Adam Walsh Child Protection and Safety Act (AWA),<sup>12</sup> which establishes a standardized, offense-based classification system for sex offenders.<sup>13</sup> The AWA specifically aims to strengthen the national network of sex offender registration and notification programs, thus potentially closing the registration loopholes highlighted by the plaintiffs'

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9. *Id.* at 1341–43.

10. This note focuses primarily on the issue of state compliance with the Sex Offender Registration and Notification Act (SORNA). However, many of the arguments concerning state compliance with SORNA may equally apply to the U.S. territories and Indian tribes.

11. See discussion *infra* Part II.

12. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified as amended at 42 U.S.C. §§ 16901–16991 (2013)).

13. See U.S. DEP'T OF JUSTICE, THE NATIONAL GUIDELINES FOR SEX OFFENDER REGISTRATION AND NOTIFICATION 21–26 (2008) [hereinafter SORNA GUIDELINES], available at [http://www.smart.gov/pdfs/final\\_sornaguidelines.pdf](http://www.smart.gov/pdfs/final_sornaguidelines.pdf).

testimony in *Bailey*.<sup>14</sup> However, this federal law, which has been described as “ambitious,” has been met with much resistance from the states.<sup>15</sup>

This note focuses on Title I of the AWA—the Sex Offender Registration and Notification Act (SORNA)<sup>16</sup>—and examines through an economic and financial lens the widespread failure of states to fully comply with the law. A number of SORNA requirements are highly expensive to implement—in particular, the directive to change from a risk assessment classification system to a tier-based offense system.<sup>17</sup> State legislatures must weigh the benefits of complying with SORNA’s requirements to determine whether they are worth the potential cost of implementation.<sup>18</sup>

Part II of this note presents a historical background of sex offender legislation, including an extensive overview of SORNA and the AWA. Part III examines state SORNA compliance and identifies cost as a key contributor to state noncompliance. Part IV proposes and assesses viable solutions to address the economic and financial difficulties that SORNA poses. Part V adds yet another layer to the discussion with a brief analysis of SORNA’s federalism implications. Part VI concludes this note.

## II. THE HISTORY AND BACKGROUND OF SORNA

Historically, society’s view of sex offenders has been “one of intolerance rather than compassion.”<sup>19</sup> The roots of U.S. sex offender laws can be traced back to the United Kingdom’s dangerous offender legislation, which applied predominantly to property offenses in the 1900s.<sup>20</sup> By the 1930s, the focus of sex offender legislation had “shifted to perverts whose sexual urges caused increasingly violent behavior.”<sup>21</sup>

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14. *See id.* at 4.

15. *See Adam Walsh Act Update: State Resistance to Comply and Federal Leniency in Compliance Review*, NAT’L JUV. JUST. NETWORK (Aug. 5, 2011), <http://www.njjn.org/uploads/digital-library/Update%20on%20State%20Compliance%20with%20AWA%208%205%2011.pdf> (“States have resisted implementing the Act for numerous reasons including: confidence in their current state registration laws[,] . . . concern about the legislation’s high costs of implementation[,] . . . and concern over the negative public safety and rehabilitation effects of placing youth on any registry, public or private.”).

16. Sex Offender Registration and Notification Act, Pub. L. No. 109-248, 120 Stat. 590 (2006) (codified as amended at 42 U.S.C. §§ 16901–16962).

17. *See* discussion *infra* Part IV.C.1.

18. This note does not address the effectiveness of the sex offender registration systems in protecting the public from sexual predators, but focuses instead on the fiscal problems facing SORNA implementation in the United States. Supporters of sex offender registration maintain that registries are a law enforcement tool—“an ability to allow the public to take measures to protect themselves”—while critics argue that community notification creates barriers to successful treatment and can destabilize offenders. *See* Emanuella Grinberg, *5 Years Later, States Struggle to Comply with Federal Sex Offender Law*, CNN (July 28, 2011, 11:51 AM), <http://www.cnn.com/2011/CRIME/07/28/sex.offender.adam.walsh.act/>.

19. Melissa Wangenheim, Note, “*To Catch a Predator, Are We Casting Our Nets Too Far?: Constitutional Concerns Regarding the Civil Commitment of Sex Offenders*,” 62 RUTGERS L. REV. 559, 568 (2010).

20. *See* LAURA J. ZILNEY & LISA ANNE ZILNEY, PERVERTS AND PREDATORS: THE MAKING OF SEXUAL OFFENDING LAWS 66 (2009) (“At this time the notion of a ‘sexual psychopath’ was equated with immorality, and thus the focus was primarily placed on gay men and other ‘indecent’ offenses.”).

21. *Id.* at 66–67 (internal quotation marks omitted).

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The ideology during this era focused on rehabilitation, and viewed sex offenders as “mentally sick” individuals.<sup>22</sup> Sexual psychopath laws developed, calling for the “involuntary” and “indefinite” commitment of offenders to psychiatric facilities.<sup>23</sup> The concept of registering offenders also originated in the 1930s.<sup>24</sup> In 1937, Florida was the first state to adopt a registration law, but only required registration for persons convicted of felonies involving “moral turpitude.”<sup>25</sup>

Initially, the enactment and enforcement of sex offender registration laws largely remained with the states.<sup>26</sup> In 1947, California enacted the first set of registration laws, requiring law enforcement agencies to compile a list of sex offenders to be used as an enforcement tool.<sup>27</sup> By 1989, only twelve states had registration laws targeting convicted sex offenders.<sup>28</sup> During the 1990s, high-profile sexual assaults and murders of children encouraged a “renewed interest in harsh sex offender legislation” at both the state and federal level.<sup>29</sup> In 1990, Washington became the first state to enact a law requiring sex offenders to register in a public registry not limited to law enforcement use.<sup>30</sup>

On September 13, 1994, President Bill Clinton signed into law the first set of federal sex offender laws in the United States, remarking:

From now on, every State in the country will be required by law to tell a community when a dangerous sexual predator enters its midst. We respect people’s rights, but today America proclaims there is no greater right than a parent’s right to raise a child in safety and love.<sup>31</sup>

The Jacob Wetterling Crimes Against Children Sex Offender Registration Act (“Wetterling Act”)<sup>32</sup> “served as the backbone and catalyst for federal sex offender

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22. *Id.* at 71.

23. *Id.* (noting that Michigan passed the United States’ first sexual psychopath law in 1937).

24. Wayne A. Logan, *Sex Offender Registration and Community Notification: Past, Present, and Future*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT, Winter 2008, at 4. State and local governments were concerned about offenders seeking “anonymous refuge within their growing populations” and enacted registration laws in response. *Id.*

25. *Id.* at 5.

26. Richard A. Paladino, Note, *The Adam Walsh Act as Applied to Juveniles: One Size Does Not Fit All*, 40 HOFSTRA L. REV. 269, 273 (2011).

27. *See id.* at 273–74. For nearly the next fifty years, sex offender registry information was accessible only by law enforcement personnel. *Id.* at 274.

28. Logan, *supra* note 24, at 5.

29. ZILNEY & ZILNEY, *supra* note 20, at 83; *see also* Logan, *supra* note 24, at 5 (“From 1990 onward, however, public policy radically changed when a handful of high-profile sexual assaults of children by ex-offenders inspired legislative attention.”).

30. Logan, *supra* note 24, at 5. Washington’s registration law permitted “dissemination of identifying information on registrants to communities in which registrants lived.” *Id.*

31. Paladino, *supra* note 26, at 277.

32. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, 108 Stat. 2038 (1994) (codified as amended at 42 U.S.C. §§ 14071–14703 (2006 & Supp.

registration laws.”<sup>33</sup> The Wetterling Act, which had the complete bipartisan support of Congress, mandated that all states implement a sex-offender registry<sup>34</sup> and sought to better safeguard the public against sexual predators by requiring sex offenders to register with their state at the completion of their prison, jail, or parole sentences.<sup>35</sup> Although twenty-four states had already enacted sex offender registration laws, Congress sought to impose uniform federal registration standards to prevent offenders from simply relocating to states that did not require registration.<sup>36</sup> The Wetterling Act generally set out the minimum standards for state sex offender registration programs<sup>37</sup> and, by 1996, every state had enacted a form of sex offender registration law.<sup>38</sup>

While allowing for community notification, the Wetterling Act did not require it.<sup>39</sup> In July of 1994, shortly before its enactment, the brutal murder of seven-year-old Megan Kanka led New Jersey legislators to “cobble[] together a bill requiring the state to assess sex offenders regarding their dangerousness to the community and to subsequently give notice to the community when that level of dangerousness rose to a serious enough level.”<sup>40</sup> Two years later, a 1996 amendment, dubbed “Megan’s Law,”<sup>41</sup> mandated that every sex offender register for community notification and

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III 2010)), *repealed by* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified as amended at 42 U.S.C. §§ 16901–16991).

33. Paladino, *supra* note 26, at 274–75.

34. *See id.* at 275.

35. *Id.*

36. *Id.* at 275–76. Congress could not mandate that the states enact the Wetterling Act, so it “backed its directive with a threat to withhold ten percent of otherwise allocated federal funding if states did not adopt and implement registration and community notification laws.” Logan, *supra* note 24, at 5–6.

37. *See* U.S. DEP’T OF JUSTICE, MEGAN’S LAW; FINAL GUIDELINES FOR THE JACOB WETTERLING CRIMES AGAINST CHILDREN AND SEXUALLY VIOLENT OFFENDER REGISTRATION ACT, AS AMENDED, A.G. ORDER No. 2196-98 (1998), *available at* <http://cl.bna.com/cl/19990120/2196.htm>.

38. *See* Logan, *supra* note 24, at 6.

39. Brittany Enniss, Note, *Quickly Assuaging Public Fear: How the Well-Intended Adam Walsh Act Led to Unintended Consequences*, 2008 UTAH L. REV. 697, 700. “As of 1996, only seventeen states allowed for notification, either via public inspection or direct community notification.” Logan, *supra* note 24, at 6.

40. Enniss, *supra* note 39; *see also* Logan, *supra* note 24, at 5 (“New Jersey’s rapid adoption of registration and notification, in the wake of Megan Kanka’s sexual abuse and murder by a convicted sex offender living nearby, fueled national interest in the social control strategies. The laws quickly swept the nation, with legislatures often adopting in verbatim from one another’s legislative findings.”). I interviewed Dr. Louis Schlesinger, a psychologist who was appointed by the president of the New Jersey Senate and acting governor to serve as a member of a Senate Task Force that rewrote Megan’s Law in 2001. Dr. Schlesinger, who is still in contact with Megan Kanka’s parents, explained that Maureen Kanka would not have allowed her daughter to walk around her neighborhood freely if she had known that a previously convicted sex offender lived on her street. Telephone Interview with Louis B. Schlesinger, Ph.D., Professor of Forensic Psychology at John Jay Coll. of Criminal Justice (Dec. 5, 2013) [hereinafter Schlesinger Interview]; *see also* Paladino, *supra* note 26, at 276 (“It was believed that had Megan’s parents been aware and notified that their neighbor was a sex offender, they would have taken the proper steps necessary to prevent Megan’s death.”); *Our Mission*, MEGAN NICOLE KANKA FOUND., <http://www.megannicolekankafoundation.org/mission.htm> (last visited Apr. 25, 2015).

41. Megan’s Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996) (amending 42 U.S.C. § 14071(d) (1994)).



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“required states to release relevant information to the community” by some method.<sup>42</sup> Although Megan’s Law was adopted in some shape or form in all fifty states,<sup>43</sup> the interpretation of what “relevant information” entailed varied from state to state.<sup>44</sup>

Federal law did not impose criminal liability on individuals who violated Megan’s Law until July 27, 2006 when the AWA<sup>45</sup> was signed into law by President George W. Bush.<sup>46</sup> The AWA, passed in the memory of six-year-old victim Adam Walsh, aimed to establish a comprehensive national registration system “[i]n order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators.”<sup>47</sup> The co-sponsor of the bill’s original Senate version, then-Delaware Senator Joseph Biden, stated: “Plain and simple, this legislation, I can say with certainty, will save children’s lives.”<sup>48</sup>

SORNA provides a comprehensive set of minimum standards<sup>49</sup> for sex offender<sup>50</sup> registration and notification in the United States,<sup>51</sup> aiming to close potential gaps and loopholes<sup>52</sup> that existed under prior federal law, as well as “strengthen[ing] the nationwide network of sex offender registration and notification programs.”<sup>53</sup> The underlying goals of SORNA are to “curb recidivism once an initial penalty has been served and to make it easier for law enforcement authorities to track post-conviction offenders.”<sup>54</sup> Practically, SORNA seeks to realize an effective and comprehensive

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42. Enniss, *supra* note 39, at 700 (internal quotation marks omitted).

43. See FRANKLIN E. ZIMRING, *AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING* 5 (2009).

44. See Enniss, *supra* note 39.

45. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified as amended at 42 U.S.C. §§ 16901–16991 (2013)).

46. See Paladino, *supra* note 26, at 277–78.

47. 42 U.S.C. § 16901.

48. Paladino, *supra* note 26, at 279.

49. SORNA “sets a floor, not a ceiling,” for jurisdictions’ sex offender registration and notification programs. SORNA GUIDELINES, *supra* note 13, at 6.

50. Under the Adam Walsh Child Protection and Safety Act (AWA), a sex offender is defined as any “individual who was convicted of a sex offense.” 42 U.S.C. § 16911.

51. See SORNA GUIDELINES, *supra* note 13, at 3.

52. [T]he AWA . . . contains the most ambitious requirements to date. This zenith resulted from congressional concern that state registration and community notification laws were “weak” and fraught with “loopholes,” and that their diverse nature created a “patchwork” permitting registrants to evade continued scrutiny, especially as a result of inter-state travel.

Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 OHIO ST. J. CRIM. L. 51, 84 (2008).

53. SORNA, OFFICE JUSTICE PROGRAMS, <http://www.smart.gov/sorna.htm> (last visited Apr. 25, 2015) [hereinafter *SORNA*].

54. Jacob Frumkin, Note & Comment, *Perennial Punishment? Why the Sex Offender Registration and Notification Act Needs Reconsideration*, 17 J.L. & POL’Y 313, 314 (2008).

national system of sex offender registration through the cooperative effort of each of the fifty states, the District of Columbia, the U.S. territories, and Indian tribal governments.<sup>55</sup>

SORNA creates a national registry by mandating that each jurisdiction<sup>56</sup> maintain a jurisdiction-wide sex offender registry. It outlines the registry requirements, establishes three tiers of sex offenders that are subject to these requirements,<sup>57</sup> and instructs the U.S. attorney general to issue specific guidelines and regulations on how to implement it.<sup>58</sup> SORNA also creates the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (“SMART Office”), which administers the registration and notification standards and assists jurisdictions with their implementation.<sup>59</sup>

A sex offender must register in the jurisdiction in which the offender was convicted, resides, is employed, and attends school.<sup>60</sup> The offender must keep current his or her registration information and is given only three business days to update a change of name, residence, employment, or student status.<sup>61</sup> Additionally, each offender must provide personal information to the National Sex Offender Registry, including: the offender’s name, Social Security number, address, name and address of employer, school name and location, license plate number and vehicle description, as well as any additional information required by the attorney general.<sup>62</sup> The information is retained in a national database at the Federal Bureau of Investigation, and the public can access this information via the “Dru Sjodin National Sex Offender Public Website.”<sup>63</sup>

55. See SORNA GUIDELINES, *supra* note 13, at 5. SORNA “[e]xtends the jurisdictions in which registration is required beyond the 50 states, the District of Columbia, and the principal U.S. territories, to include also federally recognized Indian tribes.” SORNA, *supra* note 53.

56. For purposes of sex offender registration and notification, and thus the discussion in this note, “jurisdiction” refers to each of the fifty states, the District of Columbia, and the five principal U.S. territories and federally recognized Indian tribes that elect to function as registration jurisdictions. See SORNA, *supra* note 53; see also 42 U.S.C. § 16911 (2013).

57. See *id.* § 16911(2)–(4). For more information on the three-tiered system and how each tier is defined, see *infra* note 140. The main effects of SORNA include the incorporation of “a more comprehensive group of sex offenders and sex offenses for which registration is required,” as well as “more extensive registration information” available to the public. SORNA, *supra* note 53. SORNA also requires sex offenders to make periodic in-person appearances and increases the required minimum duration of registration. *Id.*

58. Paladino, *supra* note 26, at 279. The U.S. Department of Justice released tentative guidelines on May 17, 2007. See *Summary of Final National Guidelines for Sex Offender Registration and Notification for Implementation of SORNA*, NAT’L CONF. ST. LEGISLATURES (Jan. 2009), <http://www.ncsl.org/research/civil-and-criminal-justice/summary-of-final-national-guidelines-sorna.aspx>. Final guidelines were subsequently released in July 2008. See *id.*

59. See SORNA GUIDELINES, *supra* note 13, at 3.

60. 42 U.S.C. § 16913(a).

61. *Id.* § 16913(c).

62. *Id.* § 16914(a)(1)–(7).

63. Paladino, *supra* note 26, at 280. The National Sex Offender registry provides “a physical description of the sex offender, the criminal offense that the sex offender is registered for, the criminal history of the

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The AWA directs states to impose criminal penalties on an offender who fails to comply with the registry requirements.<sup>64</sup> Additionally, state-convicted sex offenders who knowingly fail to properly register may be subject to prosecution under a new federal statute that subjects them to fines and up to ten years imprisonment.<sup>65</sup> Thus, failing to register can potentially cause an offender to be sentenced for a longer prison term than that imposed for the initial sex crime itself.<sup>66</sup> SORNA also mandates a community notification program, which requires the appropriate official in the jurisdiction to notify the U.S. attorney general, law enforcement agencies, schools, and public housing agencies in the state(s) in which the offender is registered.<sup>67</sup>

Behind SORNA and virtually every piece of U.S. sex offender legislation is a compelling political backstory.<sup>68</sup>

Citizens cannot understand a sex attack on a child, and this incomprehensibly fuels reactions of fear. . . . The attack and investigation become front-page news . . . describing the failure of the justice system to protect vulnerable persons, which fuels a strong public reaction. . . . Government officials then feel compelled to act.<sup>69</sup>

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sex offender[,] . . . a current photograph of the offender, [a] DNA sample of the sex offender, and fingerprints of the sex offender.” *Id.*

64. 42 U.S.C. § 16913(e) (“Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.”). To be considered compliant with SORNA, a jurisdiction must meet this requirement. *See* U.S. DEP’T OF JUSTICE, SEX OFFENDER REGISTRATION AND NOTIFICATION ACT: SUBSTANTIAL IMPLEMENTATION CHECKLIST 24 [hereinafter SORNA CHECKLIST], available at <http://www.smart.gov/FillableChecklistwSuppGuidelines.doc>. However, states that have not yet substantially implemented SORNA may nonetheless have penalties within their own existing systems that meet the federal standard. For example, the New York Sex Offender Registration Act provides:

Any sex offender required to register or to verify pursuant to the provisions of this article who fails to register or verify in the manner and within the time periods provided for in this article shall be guilty of a class E felony upon conviction for the first offense, and upon conviction for a second or subsequent offense shall be guilty of a class D felony.

N.Y. CORRECT. LAW § 168-t (McKinney 2007). For more on SORNA’s “substantial implementation” standard, see discussion *infra* Part III.

65. 18 U.S.C. § 2250(a) (2013). If such sex offender had also committed a violent crime under federal law, he or she may face up to thirty years imprisonment, separate from the ten-year maximum imprisonment provided under subsection (a). *See id.* § 2250(c)(1)–(2); *see also* Frumkin, *supra* note 54, at 317 (“[P]rosecutions based on violations of SORNA’s criminal provision have been challenged vigorously in federal district courts.”).
66. Frumkin, *supra* note 54, at 318.
67. Paladino, *supra* note 26, at 280. The official must also notify “any organization, company, or individual who requests notification.” *Id.*
68. *See, e.g.,* Weiser, *supra* note 5. Governor Pataki also testified about the June 2005 murder of a woman in the parking garage of the Galleria mall in White Plains, New York, at the hands of a recently paroled sex offender. *Id.*; *see also* Bailey v. Pataki, 708 F.3d 391, 393 (2d Cir. 2013).
69. ZILNEY & ZILNEY, *supra* note 20, at 83–84 (alterations in original) (quoting Roxanne Lieb et al., *Sexual Predators and Social Policy*, 23 CRIME & JUSTICE, 1998, at 43, 59).

Since the mid-1970s, anxiety over child sexual abuse has continued to mount to the point where Americans now “live in a culture of child abuse.”<sup>70</sup>

Due to this upsurge of “moral panic,”<sup>71</sup> many have argued that sex offender laws have been passed rather hurriedly and, at times, rely insufficiently on empirical evidence.<sup>72</sup> Still, these laws easily garnered the overwhelming support of the public, comprised of citizens who, understandably, hope to protect society’s women and children from sex crimes.<sup>73</sup> Due to an increased and intense media coverage of sex crimes, “the public came to believe there was an epidemic of sexual offending,” and thus associated sexual offenses with violence and murder.<sup>74</sup> In the 1990s, the public developed a “renewed awareness and hatred for sex offenders,”<sup>75</sup> evidenced by enactment of extensive new protections targeting pedophiles who prey on children over the Internet.<sup>76</sup>

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70. Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 223 (2001) (internal quotation marks omitted).

71. ZILNEY & ZILNEY, *supra* note 20, at 68–69 (2009) (“Using the language of ‘moral panic’ to discuss societal responses to sexual offenses is not meant to minimize the consequences to those victimized by such offenses. It is instead meant to denote the exaggerated and misdirected nature of societal fear and as a response the misdirected policies that have been created that do not serve to effectively prevent sexual violence.”).

72. *Id.* at 83 (“The reality is that sex offenders are a great political target, but that doesn’t mean any law under the sun is appropriate.” (internal quotation marks omitted) (quoting *Illinois Measure Would Move Some from Sex Offender List*, ASSOCIATED PRESS, June 24, 2006)). Even Dr. Schlesinger, a member of the 2001 Senate Task Force that rewrote Megan’s Law in New Jersey, called the legislation a “feel good law.” Schlesinger Interview, *supra* note 40. He further commented, “No one really knows if it works or not.” *Id.*

73. See ZILNEY & ZILNEY, *supra* note 20, at 84; see also JOEL BEST, DAMNED LIES AND STATISTICS: UNTANGLING NUMBERS FROM THE MEDIA, POLITICIANS, AND ACTIVISTS 7 (rev. ed. 2012) (arguing that much of the general public accepts at face value the statistics presented in the media even though statistics are “products of our social arrangements”); Robin Morse, Note, *Federalism Challenges to the Adam Walsh Act*, 89 B.U. L. REV. 1753, 1793 (2009) (“Crimes of sexual violence, particularly against children, justifiably provoke extreme public rage.”).

74. ZILNEY & ZILNEY, *supra* note 20, at 68.

75. Amanda Moghaddam, Comment, *Popular Politics and Unintended Consequences: The Punitive Effect of Sex Offender Residency Statutes from an Empirical Perspective*, 40 SW. L. REV. 223, 226 (2010).

76. See Adler, *supra* note 70, at 227. In 1996, Congress passed the Communications Decency Act (CDA), followed by the Protection of Children from Sexual Predators Act in 1998. Pub. L. No. 104-104, tit. V, 110 Stat. 56, 133–43 (1996), *invalidated by* Reno v. ACLU, 521 U.S. 844, 881 (1997) (striking down the CDA on First Amendment grounds); Pub. L. No. 105-314, tit. I, 112 Stat. 2974 (1998). In October 2014, twenty-five years after he was abducted, a new campaign was launched to find Jacob Wetterling, the namesake of the Wetterling Act, supporting the belief that child sexual abuse has steadily “become the master narrative of our culture[,] . . . eclips[ing] all other crimes.” Adler, *supra* note 70, at 227 (“[Child sexual abuse] is, we repeatedly hear, ‘worse than murder.’ We view it as a root cause.” (footnotes omitted)); see also *New Effort to Be Launched to Find Jacob Wetterling*, CBS MINN. (Oct. 11, 2014, 8:15 AM), <http://minnesota.cbslocal.com/2014/10/11/new-effort-to-be-launched-to-find-jacob-wetterling/>.

### III. THE PROBLEM OF STATE COMPLIANCE WITH SORNA

As indicated in Part II, the public's moral panic over sex crimes has led to quite a bit of legislative movement.<sup>77</sup> Elected officials are "eager to respond to the national cry for stricter laws and penalties,"<sup>78</sup> and legislators have largely acted upon these urges.<sup>79</sup> Yet, while calls for sex offender legislation are "politically popular,"<sup>80</sup> the laws resulting from the political and media frenzy are not always tailored to achieve effective results.<sup>81</sup> This disconnect is exemplified when examining state compliance with SORNA.

The chief objective of SORNA is to establish a comprehensive national system for the registration of sex offenders.<sup>82</sup> More uniform state laws and a centralized national database would enable law enforcement to more efficiently and thoroughly share information, preventing sex offenders from "slip[ping] through the cracks."<sup>83</sup> These uniform registration standards are "critical to sew together the patch-work quilt of 50 different State attempts to identify and keep track of sex offenders."<sup>84</sup> In a federal system like the United States, sex offender registration would prove futile if:

[R]egistered sex offenders could simply disappear from the purview of the registration authorities by moving from one jurisdiction to another, or if registration and notification requirements could be evaded by moving from a jurisdiction with an effective program to a nearby jurisdiction that required little or nothing in terms of registration and notification.<sup>85</sup>

The foundation of the system's success relies on full participation and uniformity—in essence, even if only one state or jurisdiction opts out of SORNA, the federal registry would fail.

Thus, states were given a final implementation deadline of July 27, 2011.<sup>86</sup> States that did not meet the substantial implementation requirement risked losing ten

77. See ZILNEY & ZILNEY, *supra* note 20, at 83–98.

78. Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws That Have Swept the Country*, 58 BUFF. L. REV. 1, 40 (2010).

79. See Moghaddam, *supra* note 75, at 226–27.

80. *Id.* at 233.

81. *Id.* at 245 ("[T]hese laws are the embodiment of popular politics triumphing over rational laws . . .").

82. See discussion *supra* Part II.

83. Grinberg, *supra* note 18.

84. Logan, *supra* note 52, at 75 (quoting bill co-sponsor Senator Orrin Hatch). Another co-sponsor, then-Senator Joseph Biden, also stated: "[t]his is about uniting 50 States in common purpose and in league with one another to prevent these lowlives from slipping through the cracks." *Id.* (alteration in original).

85. SORNA GUIDELINES, *supra* note 13, at 4. In their testimonies at the *Bailey* trial, former sex offenders Warren and Massei highlighted the disparities among state registration requirements. See *supra* notes 8–9 and accompanying text.

86. See *Adam Walsh Child Protection and Safety Act*, NAT'L CONF. ST. LEGISLATURES (May 7, 2014), <http://www.ncsl.org/research/civil-and-criminal-justice/adam-walsh-child-protection-and-safety-act.aspx>. Under the AWA, states were required to substantially implement SORNA "within three years of the date of enactment, July 25, 2006, or within one year of the development of registry/website software

percent of their Edward Byrne Memorial Justice Assistance Grant<sup>87</sup> provided by Title I of the Omnibus Crime Control and Safe Streets Act of 1968,<sup>88</sup> which allows state and local governments to finance a broad range of law enforcement activities, such as crime control and prevention and criminal justice reform.<sup>89</sup>

The SMART Office<sup>90</sup> is responsible for determining, on a case-by-case basis, whether a jurisdiction has substantially implemented SORNA's baseline requirements.<sup>91</sup> Under the National Guidelines for Sex Offender Registration and Notification ("Guidelines") provided by the attorney general, a jurisdiction achieves "substantial implementation" of SORNA's requirements by adopting those specific measures which the Guidelines identify.<sup>92</sup> Because these measures represent the baseline for sex offender registration and notification requirements, jurisdictions

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provided by the U.S. Attorney General, whichever is later." Enniss, *supra* note 39, at 705–06. However, the attorney general could "provide up to two one-year extensions of this deadline." SORNA GUIDELINES, *supra* note 13, at 9. In 2010, the SMART Office released the Sex Offender Registry Tool (SORT), a sex offender management application provided to states at no cost to assist in SORNA implementation. See *Reauthorization of the Adam Walsh Act*, SMART WATCH (Spring 2011), [http://ojp.gov/smart/smartwatch/11\\_spring/pfv.html](http://ojp.gov/smart/smartwatch/11_spring/pfv.html) ("SORT makes the registry setup and maintenance process as efficient and effective as possible."). The U.S. Department of Justice also developed the SORNA Exchange Portal, a tool providing sex offender registration personnel an Internet-based community that is designed to facilitate the sharing of information about sex offenders relocating between jurisdictions. See *id.* For more information on SORNA software, see *SORNA Tools*, OFFICE JUSTICE PROGRAMS, [http://ojp.gov/smart/sorna\\_tools.htm](http://ojp.gov/smart/sorna_tools.htm) (last visited Apr. 25, 2015).

87. Initial allocations of the Byrne law enforcement assistance grants are determined based on population and violent crime rates, with adjustments made to ensure necessary funding for each state, territory, and the District of Columbia. *Byrne JAG Grant Reductions Under SORNA*, OFFICE JUSTICE PROGRAMS, [http://www.smart.gov/byrneJAG\\_grant\\_reductions.htm](http://www.smart.gov/byrneJAG_grant_reductions.htm) (last visited Apr. 25, 2015).
88. See *Sex Offender Law: Down to the Wire*, NAT'L CONF. ST. LEGISLATURES (June 2011), <http://www.ncsl.org/research/civil-and-criminal-justice/sex-offender-law-down-to-the-wire.aspx>; see also Memorandum from David Niss, Staff Attorney to Members of the Law & Justice Interim Comm. for the 62nd Mont. Legislature 1 (Jan. 30, 2012) [hereinafter Niss Memorandum], available at <http://leg.mt.gov/content/Committees/Interim/2011-2012/Law-and-Justice/Meeting-Documents/Feb-2012/Legal%20Memo%20SORNA.pdf>. Funding withheld from jurisdictions on account of noncompliance would be reallocated either to compliant jurisdictions or to the noncompliant jurisdictions to be used solely for SORNA implementation efforts. SORNA GUIDELINES, *supra* note 13, at 9.
89. See 42 U.S.C. § 3756 (2013); see also *Recovery Act: Frequently Asked Questions*, OFFICE JUSTICE PROGRAMS, [http://www.ojp.usdoj.gov/recovery/FAQ\\_Overview.htm](http://www.ojp.usdoj.gov/recovery/FAQ_Overview.htm) (last visited Apr. 25, 2015).
90. The official web site of the SMART Office lists eleven staff members, headed by Luis C.deBaca. *About SMART*, OFFICE JUSTICE PROGRAMS, <http://ojp.gov/smart/about.htm> (last visited Apr. 25, 2015). C.deBaca was appointed by President Barack Obama in November 2014 as the Director of the Justice Department's SMART Office. See *Luis C.deBaca, Director*, OFFICE JUSTICE PROGRAMS, [http://ojp.gov/smart/bio\\_debaca.htm](http://ojp.gov/smart/bio_debaca.htm) (last visited Apr. 25, 2015).
91. See SORNA GUIDELINES, *supra* note 13, at 9, 11. A jurisdiction is "encouraged to submit information to the SMART Office concerning existing and proposed sex offender registration and notification provisions with as much lead time as possible, so the SMART Office can . . . work with the submitting jurisdictions to overcome any shortfalls or problems." *Id.* at 9–10.
92. *Id.* at 10.



## PAYING THE PIPER: THE COST OF COMPLIANCE WITH SORNA

with stricter laws need not amend their laws to coincide with the requirements enumerated in the Guidelines.<sup>93</sup>

In assessing compliance, the SMART Office considers the totality of a jurisdiction's rules governing the operation of its registration and notification program, including statutes and administrative policies and procedures.<sup>94</sup> However, the Guidelines stipulate that a jurisdiction's program cannot qualify as substantially implementing the SORNA requirements if it "substitute[s] some basically different approach to sex offender registration and notification that does not incorporate SORNA's baseline requirements."<sup>95</sup> Additionally, the substantial implementation standard is not met by programs that "dispense wholesale" with SORNA's main requirements.<sup>96</sup> The U.S. Department of Justice has made available a twenty-two-page checklist as a tool to guide jurisdictions in achieving substantial implementation.<sup>97</sup> In order for a SMART Office policy advisor to determine whether a jurisdiction has complied with SORNA, this checklist must be submitted to the SMART Office for review as part of a "complete substantial implementation package."<sup>98</sup>

Effectively, states only have three viable options in deciding how to respond to SORNA's directive: "(1) don't comply; (2) substantially comply; or (3) challenge the Act's constitutionality and make reasonable changes."<sup>99</sup> The SMART Office acknowledges that state compliance has been an "uphill battle";<sup>100</sup> in its most recent

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93. See *SMART General FAQs*, OFFICE JUSTICE PROGRAMS, [http://ojp.gov/smart/faq\\_general.htm](http://ojp.gov/smart/faq_general.htm) (last visited Apr. 25, 2015). There is one exception to this rule: SORNA requires that "victim identity, registrant Social Security Number, registrants' arrests not resulting in conviction, and passport and immigration information [] be excluded from publicly accessible state sex offender web sites." *Id.*

94. See SORNA GUIDELINES, *supra* note 13, at 9.

95. *Id.* at 10. For example, a risk assessment approach that broadly authorizes the waiver or limitation of registration or notification requirements on the basis of factors that SORNA does not recognize would not be approved as substantially implementing SORNA. *Id.*

96. *Id.* Listed examples include: "adopting general standards that do not require registration for offenses included in SORNA's offense coverage provisions, [] set[ting] regular reporting periods for changes in registration information that are longer than those specified in SORNA, [and] prescrib[ing] less frequent appearances for verification or shorter registration periods than SORNA requires." *Id.*

97. See SORNA CHECKLIST, *supra* note 64. While encouraging jurisdictions to utilize the checklist, the SMART Office has also advised that the checklist is not exhaustive, and jurisdictions should therefore "work closely with their assigned policy advisors throughout the implementation process to ensure that all the necessary issues for substantial implementation are addressed." *Resources: SORNA Checklist*, OFFICE JUSTICE PROGRAMS, [http://ojp.gov/smart/smartwatch/10\\_winter/checklist.html](http://ojp.gov/smart/smartwatch/10_winter/checklist.html) (last visited Apr. 25, 2015).

98. *Submitting Substantial Implementation Materials to the SMART Office*, OFFICE JUSTICE PROGRAMS, [http://ojp.gov/smart/sorna\\_tools\\_materials.htm](http://ojp.gov/smart/sorna_tools_materials.htm) (last visited Apr. 25, 2015).

99. Enniss, *supra* note 39, at 714. SORNA contains special provisions for cases in which the jurisdiction's highest court has held that the state constitution conflicts with SORNA requirements. See 42 U.S.C. § 16925(b) (2013). In fact, Congress expressly provided that a state need not adopt any AWA requirement that is declared unconstitutional by the state's highest court. *Id.* § 16925(b)(1). In such cases, the SMART Office will work with the jurisdiction to resolve the problem. *Id.* § 16925(b)(2). If the problem cannot be overcome, the SMART Office may approve of reasonable alternative measures consistent with the purposes of SORNA. *Id.* § 16925(b)(3); see also SORNA GUIDELINES, *supra* note 13, at 11.

100. Grinberg, *supra* note 18.

update, only seventeen states, three territories, and eighty tribes were found to have substantially implemented SORNA's requirements.<sup>101</sup>

States have created working groups or committees to weigh the various policy considerations in their approaches to implementing SORNA.<sup>102</sup> Although the reasons for state noncompliance stem from both economic and substantive concerns,<sup>103</sup> many of the working groups have focused mainly on the fiscal costs and benefits in their analysis of whether to implement SORNA.<sup>104</sup> At least seven states have explicitly expressed apprehension over the fiscal difficulties of implementing SORNA.<sup>105</sup> The financial cost-benefit justification for noncompliance seems especially reasonable, as states do not want the reputation of being either "soft on crime" or safe havens for sex offenders seeking to avoid registration requirements.<sup>106</sup>

In attempting to comply with SORNA, states expect to incur significant costs in various areas, including: additional personnel; new software installation and maintenance; additional jail and prison space; increased court and administrative needs; law enforcement, including the need to verify information at more frequent intervals; and legislative costs associated with adopting and crafting state laws.<sup>107</sup>

101. See *SORNA Substantial Implementation Update*, SMART WATCH (Summer 2014), [http://www.smart.gov/smartwatch/14\\_summer/news-1.html](http://www.smart.gov/smartwatch/14_summer/news-1.html). July 27, 2010 was the implementation deadline for the comprehensive national system for the registration of sex offenders. *Cost-Benefit Analyses of SORNA Implementation*, NAT'L CONF. ST. LEGISLATURES (Jan. 2010), <http://www.ncsl.org/research/civil-and-criminal-justice/cost-benefit-analyses-of-sorna-implementation.aspx>. The SMART Office identified the following states as having met the compliance deadline: Alabama, Colorado, Delaware, Florida, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nevada, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, and Wyoming. *Jurisdictions That Have Substantially Implemented SORNA*, OFFICE JUSTICE PROGRAMS, [http://ojp.gov/smart/newsroom\\_jurisdictions\\_sorna.htm](http://ojp.gov/smart/newsroom_jurisdictions_sorna.htm) (last visited Apr. 25, 2015). Additionally, the U.S. territory of Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands were found to be in compliance with SORNA. *Id.*

102. See *Cost-Benefit Analyses of SORNA Implementation*, *supra* note 101; see also *Sex Offender Law: Down to the Wire*, *supra* note 88 ("At a hearing . . . of the House Subcommittee on Crime, Terrorism, and Homeland Security to review the Adam Walsh Act, of which SORNA is a part, Chair James Sensenbrenner, a key backer of SORNA, expressed his displeasure with the vast majority of states that have not complied with the law so far.").

103. In a 2009 survey, common substantive concerns reported by the states were: technological modifications, constitutional challenges, difficulties with implementation of juvenile requirements, and various legislative obstacles, including uncertainty over approval of implementing legislation. See THE NAT'L CONSORTIUM FOR JUSTICE INFO. & STATISTICS, SEARCH SURVEY ON STATE COMPLIANCE WITH THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT (SORNA) 3-9 (Apr. 2009) [hereinafter SURVEY ON COMPLIANCE WITH SORNA], available at <http://www.search.org/files/pdf/SORNA-StateComplianceSurvey2009.pdf>.

104. See *Cost-Benefit Analyses of SORNA Implementation*, *supra* note 101.

105. See SURVEY ON COMPLIANCE WITH SORNA, *supra* note 103, at 2. States that identified cost or lack of funding as a main barrier to SORNA compliance include: California, Colorado, Florida, Georgia, Maine, Oregon, and West Virginia. See *id.* 3-9.

106. Enniss, *supra* note 39, at 714 ("[I]t would be political suicide to not comply with the Adam Walsh Act.").

107. See *What Will It Cost to Comply with the Sex Offender Registration and Notification Act?*, JUSTICE POL'Y INST., [http://www.justicepolicy.org/images/upload/08-08\\_FAC\\_SORNACosts\\_JJ.pdf](http://www.justicepolicy.org/images/upload/08-08_FAC_SORNACosts_JJ.pdf) (last visited Apr. 25, 2015).



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Notably, in every state, the first year costs of SORNA implementation outweigh the cost of losing ten percent of the state's Byrne funding.<sup>108</sup> In California, the Sex Offender Management Board recommended that the state legislature, governor, and citizens elect not to comply with the AWA, emphasizing the "substantial" and "un-reimbursed" costs associated with the law.<sup>109</sup> A study by the Texas Senate Criminal Justice Committee also found that losing ten percent of federal justice funding was an inadequate incentive to comply with SORNA,<sup>110</sup> estimating that "it would cost \$38.7 million to comply, but the state would lose only about \$1.4 million in Byrne funds if it refused."<sup>111</sup>

Additionally, the SORNA program itself is underfunded, and Congress has failed to allocate consistent funding to underwrite the significant compliance costs incurred by state and local governments,<sup>112</sup> giving a mere \$39 million to forty-three states in 2011.<sup>113</sup> State leaders frequently refer to SORNA as an "unfunded mandate" and describe a "disturbing disconnect" in withholding funds that support services to help states meet the federal requirements.<sup>114</sup> Further, any grants that local law enforcement receive go toward financing the extensive registry requirements and enforcing its attendant criminal provisions.<sup>115</sup>

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108. *Id.*; *Adam Walsh Act: Statement of Position*, CAL. SEX OFFENDER MGMT. BOARD 1 (2009), available at [http://www.opd.ohio.gov/AWA\\_Information/AWA\\_CA\\_SOMB\\_SORNA\\_Position\\_Paper.pdf](http://www.opd.ohio.gov/AWA_Information/AWA_CA_SOMB_SORNA_Position_Paper.pdf) ("Instead of incurring the substantial—and un-reimbursed—costs associated with the Adam Walsh Act, California should absorb the comparatively small loss of federal funds that would result from not accepting the very costly and ill-advised changes to state law and policy required by the Act."). The California Sex Offender Management Board cited an assessment by the state attorney general's office that the costs of implementing SORNA far exceeded the penalty of reduced justice assistance funds. *Id.* at 3.

109. *Adam Walsh Act: Statement of Position*, *supra* note 108.

110. *See Sex Offender Law: Down to the Wire*, *supra* note 88. The Texas Senate recommendation also offered public safety reasons not to comply with SORNA. *See id.* ("Senator John Whitmire, chairman of the Criminal Justice Committee, says the federal mandates are no better than Texas' laws that restrict parole and commit or supervise offenders based on their dangerousness.").

111. *Id.* Another example is Montana. Because Montana law requires the offender to be classified based upon a risk assessment scheme, the National Conference of State Legislatures reported that Montana would lose \$87,600 in federal grant money in 2012. *See SORNA Noncompliance Penalties*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/Portals/1/documents/cj/jagstatedollars.pdf> (last visited Apr. 25, 2015).

112. *See Sex Offender Law: Down to the Wire*, *supra* note 88. The California Sex Offender Management Board labeled SORNA "[a]n Unfunded Mandate." *Adam Walsh Act: Statement of Position*, *supra* note 108, at 3.

113. *See Sex Offender Law: Down to the Wire*, *supra* note 88.

114. *Id.* Representative Pat Colloton of Kansas told a U.S. House subcommittee:

It is troubling that states that don't have the resources to accommodate what is a tremendously costly unfunded mandate will have to watch as the very services our criminal justice systems rely upon are cut even further. . . . Particularly in this economy, no state can afford a significant new unfunded mandate to change public safety approaches already undertaken.

*Id.*

115. *See Frumkin*, *supra* note 54, at 315.

Susan Frederick, federal affairs counsel for the National Conference of State Legislatures, thoughtfully commented on the states' dilemma: "States are very sympathetic to the need to supervise and penalize registered sex offenders. . . . But any time you're going to be collecting and cataloging information on more people more often, that comes at a high cost. The question is whether it's worth it."<sup>116</sup> Unfortunately, the manner in which SORNA frames this economic cost-benefit question gives states a number of reasons to choose not to comply with the program.

#### IV. FISCAL RESPONSES TO THE SORNA COMPLIANCE PROBLEM

There are three practical routes the federal government can take to reframe the financial cost-benefit analysis for state SORNA compliance. Congress can: (1) give states more incentive to comply by increasing the percentage of Byrne budget cuts (subject to constitutional limitations); (2) provide more funding to states to further assist them in executing SORNA requirements; or (3) relax one or more of the requirements that impose the greatest financial burdens on the states.

##### *A. Create More Financial Incentive for States to Comply*

Congress has authority under its Article I spending power to use federal funds to encourage state compliance with federal policy goals.<sup>117</sup> However, since compliance is discretionary, a state need not comply with any of the SORNA guidelines if the state is willing to forgo the ten percent funding incentive by the federal government.<sup>118</sup> This option has been recommended to states by a number of SORNA opponents, and at least some states have debated whether the costs of complying with the law outweigh its financial benefits.<sup>119</sup> This is unsurprising because studies have shown that, in all fifty states, the first-year costs of implementing SORNA outweigh losing ten percent of the state's Byrne grant.<sup>120</sup> Therefore, one obvious solution to foster compliance is to increase the size of the Byrne funding cut.<sup>121</sup>

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116. Grinberg, *supra* note 18.

117. See, e.g., *United States v. Perry*, 788 F.2d 100, 109 (3d Cir. 1986) ("Congress can use its spending powers to coerce conduct consistent with its views of the general welfare in ways that it perhaps could not otherwise command.").

118. See Frumkin, *supra* note 54, at 337.

119. *Id.*

120. See generally *What Will It Cost to Comply with the Sex Offender Registration and Notification Act?*, *supra* note 107. In 2014, the lower end of state Byrne grants included North Dakota (\$481,818); Vermont (\$483,863); South Dakota (\$542,154); and Wyoming (\$566,603). *Fiscal Year (FY) 2014 State Edward Byrne Memorial Justice Assistance Grant (JAG) Allocations*, BUREAU JUSTICE ASSISTANCE, <https://www.bja.gov/%5CFunding%5C14JAGStateAllocations.pdf> (last visited Apr. 25, 2015) [hereinafter *2014 JAG Allocations*]. The highest 2014 state Byrne grants were California (\$19,301,034); Texas (\$13,849,044); Florida (\$11,779,285); and New York (\$9,852,423). *Id.* Of the above listed states, Florida, South Dakota, and Wyoming have currently achieved substantial implementation of the SORNA requirements. See *SORNA*, *supra* note 53.

121. See Ted Gest, *Feds Begin Penalizing States That Haven't Adopted U.S. Sex Offender Law*, CRIME REPORT (Apr. 12, 2012, 4:37 AM), <http://www.thecrimereport.org/viewpoints/2012-04-sorna> ("In practice, the

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Constitutional limitations on Congress's spending power must be taken into account with any conditional spending approach. In the 2012 case, *National Federation of Independent Business v. Sebelius*, the U.S. Supreme Court reaffirmed that congressional spending power cannot be used to violate the "basic principle that the Federal Government may not compel the States to enact or administer a federal regulatory program."<sup>122</sup> In essence, the amount of the budget cut must not be "so coercive as to pass the point at which 'pressure turns into compulsion.'"<sup>123</sup> Still, it is possible for Congress to increase the ten percent Byrne budget cut, consistent with constitutional limits, so as to provide a stronger financial incentive for the states to comply with SORNA.<sup>124</sup> In *Sebelius*, states that opted out of the Medicaid expansion faced (on average) losses of more than \$1 billion in Medicaid funding each year.<sup>125</sup> Based on the states' Byrne grants in 2014, a ten percent cut would range from \$48,182 to \$1,930,103—even a substantial increase on these figures is unlikely to meet the coercion threshold condemned in *Sebelius*.<sup>126</sup>

### B. Provide More State Funding

A second alternative to the financial problem posed by SORNA implementation is to give states more money in order to make compliance financially more attractive. SORNA specifically authorizes the Sex Offender Management Assistance grant program to help offset SORNA implementation costs, granting positive funding assistance to all eligible jurisdictions.<sup>127</sup> It also allows for enhanced payments to jurisdictions that achieve compliance within one or two years of SORNA's enactment.<sup>128</sup>

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cuts ordered by [the] Justice Department will not go so deeply. Only federal money going solely to state governments will suffer the 10 percent reduction, not the relatively large amount of U.S. aid destined for local governments."'). For a full list of SORNA noncompliance penalties, see *SORNA Noncompliance Penalties*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/Portals/1/documents/cj/jagstatedollars.pdf> (last visited Apr. 25, 2015).

122. 132 S. Ct. 2566, 2601 (2012) (internal quotation marks omitted).

123. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

124. In *National Federation of Independent Business v. Sebelius*, the Medicaid expansion provision was found to be coercive because the penalty for noncompliance (i.e., taking away the states' existing Medicaid funding) "threatened loss of over 10 percent of a State's overall budget," which the Court deemed "economic dragooning that leaves the States with no real option but to acquiesce." 132 S. Ct. at 2605. Thus, it was not the percentage of the cut but the total dollar amount that was dispositive in *Sebelius*. In *South Dakota v. Dole*, the Court had approved a 5 percent cut to federal highway funds (on the condition that states adopt the federal drinking age of 21) as non-coercive and without hesitation. 483 U.S. at 211 ("When we consider, for a moment, that all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5 [percent] of the funds otherwise obtainable under specified highway grant programs, the argument as to coercion is shown to be more rhetoric than fact.").

125. See KENNETH R. THOMAS, CONG. RESEARCH SERV., R42367, THE CONSTITUTIONALITY OF FEDERAL GRANT CONDITIONS AFTER *NATIONAL FEDERATION OF INDEPENDENT BUSINESS V. SEBELIUS* 2 (2012).

126. See 2014 JAG Allocations, *supra* note 120.

127. 42 U.S.C. § 16926(a) (2013).

128. *Id.* § 16926(c); see also SORNA GUIDELINES, *supra* note 13, at 11.

In 2014, the U.S. Department of Justice announced more than \$17 million in fiscal year grant assistance for states, territories, and tribal governments that implement SORNA's sex offender programming.<sup>129</sup> Roughly \$13 million of the 2014 total is allocated to specifically further the objectives of SORNA.<sup>130</sup> The amount of federal funding for SORNA implementation seems stagnant. In 2013, the U.S. Department of Justice awarded approximately \$13.3 million to forty-seven jurisdictions in order to further the objectives of SORNA.<sup>131</sup> In 2012, \$13.69 million was awarded to fifty-six jurisdictions.<sup>132</sup>

Although these grants are considerable, SORNA-targeted funding has not increased in recent years and is still nowhere near sufficient when looking at each state's actual implementation costs, which have been estimated to be as high as \$59.2 million in California, \$38.8 million in Texas, and \$31.3 million in New York—figures that far exceed the total sum of federal assistance granted in 2013.<sup>133</sup> Thus, there must be a significant increase in federal assistance aimed at furthering SORNA goals to make a tangible difference in state compliance.<sup>134</sup>

### C. Cut Implementation Costs

A third possible solution for lessening SORNA's financial strain on the states is to reconsider the substantial implementation standard and to relax some of its requirements,<sup>135</sup>

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129. See Press Release, Dep't of Justice, Office of Justice Programs, Justice Department Announces \$17.6 Million in Awards to Support Sex Offender Registration, Intervention and Treatment (Sept. 19, 2014), <http://ojp.gov/newsroom/pressreleases/2014/ojppr092914.pdf>.

130. See *id.*; see also *Funding Opportunities*, OFFICE JUSTICE PROGRAMS, <http://www.ojp.usdoj.gov/smart/funding.htm> (last visited Apr. 25, 2015). The number of jurisdictions that received SORNA funding for the year of 2014 was not specified. See *id.*

131. See Press Release, Dep't of Justice, Office of Justice Programs, Justice Department Announces \$15.5 Million in Awards to Support Sex Offender Registration, Assessment, Intervention (Sept. 16, 2013), <http://ojp.gov/newsroom/pressreleases/2013/ojppr091613.pdf>; see also *Funding Opportunities*, *supra* note 130. The remaining \$2.2 million will be used to fund four different related projects: "Sex Offender Treatment Intervention and Progress Scale (SOTIPS) project sites support, the Sex Offender Management Fellowship program, the SORNA Tribal Training and Technical Assistance Program, and . . . the Dru Sjodin National Sex Offender Public Website (NSOPW) operation." *Justice Department Announces \$15.5 Million in Awards to Support Sex Offender Registration, Assessment, Intervention*, CAL. REFORM SEX OFFENDER LAWS (Sept. 16, 2013), <http://californiarsol.org/2013/09/justice-department-announces-15-5-million-in-awards-to-support-sex-offender-registration-assessment-intervention/>.

132. *Funding Opportunities*, *supra* note 130. The details of funding grants in subsequent years are also listed on the SORNA web site. See *id.*

133. See *What Will It Cost to Comply with the Sex Offender Registration and Notification Act?*, *supra* note 107.

134. For a more in-depth discussion on the process of federal funding to states and local governments, see CONG. BUDGET OFFICE, FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS (2013), *available at* [http://www.cbo.gov/sites/default/files/43967\\_FederalGrants.pdf](http://www.cbo.gov/sites/default/files/43967_FederalGrants.pdf).

135. The Guidelines explicitly state that there is "some latitude" in evaluating a jurisdiction's implementation efforts, which means that states need not follow the SORNA specifications exactly. SORNA GUIDELINES, *supra* note 13, at 10.

the value of which policymakers have already begun to question.<sup>136</sup> Rather than targeting known sex offenders, a significant portion of the resources given to states are being devoted to the administrative maintenance of the registry and notification systems,<sup>137</sup> which have not achieved SORNA's goal to protect communities from sexual offenses.<sup>138</sup> At this point, focusing federal funding on amending SORNA's shortcomings may be a better allocation of current resources than attempting to enforce its implementation in noncompliant jurisdictions.<sup>139</sup>

Congress could choose to relax SORNA compliance requirements in order to lessen the financial strain on the states in three ways: (1) allow states to keep their own sex offender classification systems; (2) allow states to follow their own philosophy of juvenile justice; and (3) reduce the frequency of in-person appearance requirements.

### 1. *Allow States to Keep Risk-Assessment Based Classification Systems*

SORNA institutes a three-tiered system, ranking sex offenders based upon the severity of the committed offense. Each tier requires a different time span for which the sex offender must be registered and imposes distinct verification appearance requirements.<sup>140</sup> While jurisdictions need not label their sex offenders according to SORNA's three-tiered system, a jurisdiction must ensure that sex offenders who meet the substantive criteria for placement in a particular tier are, at a minimum,

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136. See *Sex Offender Law: Down to the Wire*, *supra* note 88 ("State sex offender registries already contain names, addresses, photos, vehicle, job and other identifying information on hundreds of thousands of convicted sex offenders. If public safety is the goal of maintaining all these public registries, it's not clear if all the information makes communities safer or if the most dangerous predators become lost among a growing swell of electronic information.").

137. See *What Will It Cost to Comply with the Sex Offender Registration and Notification Act?*, *supra* note 107.

138. See *id.* ("Registries and notification have not been proven to protect communities from sexual offenses, and may even distract from more effective approaches.").

139. See Frumkin, *supra* note 54, at 356 ("One of the biggest problems with SORNA, and registration systems generally in the United States, is the extensive community notification. Congress should take a cue from other countries and outspoken organizations and diminish community notification.").

140. Paladino, *supra* note 26, at 281.

A tier I sex offender is defined as a "sex offender other than a tier II or tier III sex offender." A tier I sex offender is required to register on the sex registry for fifteen years, and must verify once every year. A tier II sex offender is defined as "a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year" and the offense falls into one of two categories. A tier II sex offender is required to stay on the registry for twenty-five years, and must report in person every six months. A tier III sex offender is defined as a sex offender "whose offense is punishable by imprisonment for more than 1 year" and the offense: (1) is comparable or more severe than aggravated sexual abuse or sexual abuse; (2) is abusive sexual contact against a minor twelve years or younger; or (3) involves kidnapping of a minor. A tier III sex offender is required to stay on the registry for life, and must report in person to the jurisdiction every three months.

*Id.* (footnotes omitted).

subject to “the duration of registration, frequency of in-person appearances for verification, and extent of website disclosure that SORNA requires for that tier.”<sup>141</sup>

In 2011, SMART Office officials told a U.S. House Judiciary Subcommittee “that SORNA’s tiered classification system [was] a barrier for at least 11 states.”<sup>142</sup> Lawmakers must work to reclassify crimes and change notification practices in the states that fail to meet the federal three-tier requirements.<sup>143</sup> The implementation costs of the federal classification method are substantial because many offenders must then be added to the state registry, which further increases administrative costs.<sup>144</sup> Currently, at least half of the fifty states use risk-based assessment systems<sup>145</sup> to classify sexual offenders (rather than the SORNA three-tier system).<sup>146</sup>

Moreover, comprehensive studies have shown that actuarial risk assessment scores consistently outperform the SORNA tier system in accurately predicting sexual re-offending.<sup>147</sup> Some states—for example, Montana and New York—have explained that their refusal to comply with SORNA is based on SORNA’s mandate to adopt the federal three-tier system.<sup>148</sup>

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141. SORNA GUIDELINES, *supra* note 13, at 22.

142. *Sex Offender Law: Down to the Wire*, *supra* note 88.

143. *See id.*

144. *See* Niss Memorandum, *supra* note 88, at 2 (“[T]he federal classification system would add more offenders to the state registry and thereby make the registry more expensive to administer.”). The California Sex Offender Management Board estimated a \$770,000 one-time cost—at a minimum—to reclassify currently registered offenders. *Adam Walsh Act: Statement of Position*, *supra* note 108, at 3.

145. *SORNA and Sex Offender Policy in the States*, COUNCIL ST. GOV’TS, Winter 2010, at 6 [hereinafter COUNCIL ST. GOV’TS], available at <http://www.csg.org/policy/documents/SORNABriefFINAL.pdf>.

146. “Under SORNA, offenders are categorized based on their offense, rather than by their risk to re-offend.” *Id.* Eliminating SORNA’s offense-based tier system would also lessen the burden on states using an undifferentiated offense-based approach (states that would otherwise have to enact more tailored laws to achieve compliance with SORNA).

147. *See, e.g.*, Kristen M. Zgoba et al., *A Multi-state Recidivism Study Using Static-99R and Static-2002 Risk Scores and Tier Guidelines from the Adam Walsh Act*, Doc. No. 240099, at 4 (Nov. 2012), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/240099.pdf>. A November 2012 multi-state recidivism study, funded by the U.S. Department of Justice, examined the Static-99R and Static-2002 risk assessment tools in comparison with the Tier Guidelines from the AWA. *See generally id.*

The findings call into question the accuracy and utility of the AWA classification system in detecting high-risk sex offenders and applying concordant risk management strategies. If decision-making is [to] be driven by assigning offenders into defined risk classes, those categories must be determined by empirically derived procedures that are most likely to correctly identify higher risk offenders in a meaningful, systematic, and hierarchical manner.

*Id.* at 4.

148. *See* Niss Memorandum, *supra* note 88, at 2 (“For Montana, that noncomplying method of offender classification is problematic because the use of the risk assessment method for classification is mandated by statute.”); *see also* Letter from Risa S. Sugarman, Deputy Comm’r & Dir., Office of Sex Offender Mgmt., to Linda Baldwin, Dir., U.S. Dep’t of Justice 1–2 (Aug. 23, 2011) [hereinafter Sugarman Letter], available at <http://media.navigatored.com/documents/NY+Baldwin+SORNA+notification.pdf> (“After examining the proposed federal approach which focuses on the crime of conviction, we are



## PAYING THE PIPER: THE COST OF COMPLIANCE WITH SORNA

Even assuming that risk assessment is not a superior tool for predicting recidivism, the purely financial rationale for allowing states to keep their own classification system remains valid. The offense-based tier system “pulls too many offenders onto the registry”—costing significantly more resources to register and maintain—and thus overburdens law enforcement.<sup>149</sup> Removing the tier system requirement would eliminate enormous costs for many states that identify this financial constraint as a primary obstacle to implementing SORNA.

### 2. *Allow States to Follow Their Own Philosophy of Juvenile Justice.*

SORNA is the first federal law that requires juveniles to register as adult sex offenders.<sup>150</sup> Individual states have existing systems in place to properly punish serious juvenile sex offenders.<sup>151</sup> Many of these states have elected to exclude juveniles from registration outright, while others have left the issue to judicial discretion.<sup>152</sup> For instance, in Utah, juvenile sex offenders are committed to the division of Juvenile Justice Services and detained thirty days prior to the individual’s twenty-first birthday.<sup>153</sup> Upon release, the juvenile-court judge decides whether the offender will be subject to registration requirements.<sup>154</sup>

According to SMART Office officials, the juvenile registration requirements are “[t]he most significant barrier” to compliance<sup>155</sup> and conflict with certain state laws regarding the confidentiality of juvenile records, prompting important public policy concerns about juvenile rehabilitation goals.<sup>156</sup> Adding juvenile offenders to the adult registry would increase the number of offenders in the system and may require adding separate reporting facilities—resulting in heavy administration and maintenance costs.

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concerned that the federal approach may both over- and understate threat in a way that is not consistent with [New York’s] public safety goals.”).

149. Grinberg, *supra*, note 18.

150. 42 U.S.C. § 16911(8) (2013) (“The term ‘convicted’ or a variant thereof, used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse . . .”).

151. See Enniss, *supra* note 39, at 714.

152. See *Sex Offender Law: Down to the Wire*, *supra* note 88.

153. Enniss, *supra* note 39, at 714–15.

154. *Id.* at 715.

155. See *Sex Offender Law: Down to the Wire*, *supra* note 88. Ohio was found to have substantially implemented SORNA requirements even though its juvenile-sex-offender registration laws deviated from SORNA’s minimal requirements. See Paladino, *supra* note 26, at 298–300; see also U.S. DEP’T OF JUSTICE, SORNA IMPLEMENTATION REVIEW: STATE OF OHIO 2–3 (2009), available at <http://www.smart.gov/pdfs/sorna/Ohio.pdf>.

156. See *Sex Offender Law: Down to the Wire*, *supra* note 88.

At least twenty-three states cited SORNA's application to the juvenile population as a barrier to compliance.<sup>157</sup> If states were allowed to maintain their own philosophy of juvenile justice in approaching juvenile-sex-offender registration, then a major obstacle to gaining universal state compliance would be eliminated.

### 3. *Relax the In-Person Registration Requirements of SORNA*

Lastly, SORNA requires an offender to make periodic appearances before a law enforcement agency to verify certain matters, such as where the offender is residing.<sup>158</sup> The increased frequency requirements mandated by SORNA impose substantial maintenance costs on the states, especially due to the increased personnel needed to administer these requirements.<sup>159</sup> At least eight states have complained that the in-person reporting and increased verification requirements pose substantial hurdles to SORNA compliance.<sup>160</sup> In California, it was estimated to cost local law enforcement agencies at least \$10 million to meet the new frequency of registration requirement<sup>161</sup>—the benefits of which are arguably an unnecessary obstacle to achieving national compliance with SORNA.

The cost-reduction methods identified above are but a few examples of potential measures that Congress could take to both lessen the financial burden on states and facilitate compliance with SORNA. More important is the reminder that SORNA's core objective lies in establishing and improving the national baseline of registration and notification standards so that fewer offenders will become "lost" within the

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157. See COUNCIL ST. GOV'TS, *supra* note 145, at 4. See, e.g., Sugarman Letter, *supra* note 148, at 2 ("New York has a long standing public policy of treating juvenile offenders differently from adult offenders so that juveniles have the best opportunity of rehabilitation and re-integration. The federal requirement that juveniles be placed on the Sex Offender Registry under SORNA is in direct conflict with that public policy."); *Adam Walsh Act: Statement of Position*, *supra* note 108, at 3 ("If California were to adopt the Adam Walsh Act the state would, for the first time, include juveniles over the age of 14, determined to be a tier three risk, on the public Megan's Law website. . . . There is no evidence, to date, that the inclusion of juvenile offenders into public registries increases public safety or promotes effective juvenile offender reentry.").

158. 42 U.S.C. § 16916 (2013).

A sex offender shall appear in person, allow the jurisdiction to take a current photograph, and verify the information in each registry in which that offender is required to be registered not less frequently than—(1) each year, if the offender is a tier I sex offender; (2) every 6 months, if the offender is a tier II sex offender; and (3) every 3 months, if the offender is a tier III sex offender.

*Id.*

159. See *Sex Offender Law: Down to the Wire*, *supra* note 88. The SMART Office provides that it will consider alternatives to interim in-person appearances for Tier II and Tier III offenders. See *SORNA "In-Person" Registration Requirements*, OFFICE JUSTICE PROGRAMS, [http://ojp.gov/smart/registration\\_requirements.htm](http://ojp.gov/smart/registration_requirements.htm) (last visited Apr. 25, 2015).

160. See SURVEY ON COMPLIANCE WITH SORNA, *supra* note 103. As of April 2009, these states were Arizona, Connecticut, Hawaii, Illinois, Michigan, Texas, Vermont, and Wisconsin. See *id.*

161. See *Adam Walsh Act: Statement of Position*, *supra* note 108, at 3. These verification and in-person appearance costs are projected to increase significantly due to ongoing staffing expenses. *Id.*



system. If SORNA's goal is to maximize the effectiveness of sex offender registration and notification on a national level, steps must be taken to encourage states to comply with SORNA's most crucial aspects, rather than give states the financial incentive to abandon it altogether.

## V. THE IMPLICATION OF FEDERALIST PRINCIPLES

Some of SORNA's costly requirements add another layer to the equation: the implication of federalism principles. The federal government is given a few defined areas of authority prescribed in Article I of the Constitution, and the Tenth Amendment reserves the balance of authority to the states—including the “police power.”<sup>162</sup> For most of the first half of the twentieth century, federal involvement in criminal justice matters remained “limited and episodic” because state and local governments handled them.<sup>163</sup> Over time, the federal government has become increasingly involved in the criminal justice system and made “liberal use of its Commerce Clause authority to expand its criminal law jurisdiction.”<sup>164</sup> However in 1995, the Supreme Court's decision in *United States vs. Lopez* signaled a shift in the Court's willingness to countenance a general legislative power through the commerce clause in cases involving non-economic criminal activity.<sup>165</sup> Thus, SORNA and other criminal justice policies relating to sex offender registration and community notification generally were implemented not under Congress's commerce clause authority, “but rather more subtly through its conditional Spending Power authority.”<sup>166</sup>

In the 1990s, Congress relied on its spending power “to compel changes in state criminal justice policy” with respect to community control of sex offenders.<sup>167</sup> Although once a matter “unmistakably within the historic purview of states,” state sex offender registration and notification laws are now “the direct result of federal

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162. Logan, *supra* note 52, at 53 (describing the “police power” as an “expansive authority James Madison regarded as extending ‘to all objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people’”).

163. *Id.* at 54.

164. *Id.* at 59 (discussing Congress's method of coercing state compliance by means of conditional federal funding).

165. 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act of 1990 as outside the scope of Congress's commerce clause authority); *see also* Christopher DiPompeo, Comment, *Federal Hate Crime Laws and United States v. Lopez: On a Collision Course to Clarify Jurisdictional-Element Analysis*, 157 U. PA. L. REV. 617, 618 (2008) (“[*Lopez*] signaled the modern Court's resistance to allowing Congress to exercise a general legislative power through the Commerce Clause, particularly in cases involving non-economic criminal activity.”).

166. Logan, *supra* note 52, at 52. “Since 1994, Congress has repeatedly imposed new registration requirements on the states” through its Article I spending power. *Id.* at 69. Note, however, that Congress did use its commerce clause authority—and not its spending clause authority—to impose federal criminal liability for registration violations under the AWA. *See id.* at 79.

167. *See id.* at 59. The federal government had moved to nationalize disparate state approaches to sex offender registration and community notification. *See id.* at 121–22 (“That the shift has occurred via federal use of the ‘Trojan horse’ of conditional spending power authority, rather than through the more controversial method of Commerce Clause authority, does not alter the outcome.”).

initiative and preference.”<sup>168</sup> Many of the requirements imposed by SORNA require major changes to state laws—most notably, the juvenile registration requirements—and arguably infringe on traditional state autonomy.<sup>169</sup> Furthermore, the lingering reluctance of many states to abandon their own local sex offender system suggests that noncompliance with SORNA may, in certain aspects, better serve the state’s local interests and values.<sup>170</sup>

## VI. CONCLUSION

The principal objective of the AWA, and specifically SORNA, was to strengthen the national network of sex offender registration and notification. The hope was to eliminate loopholes to prevent sex offenders from easily evading the system by relocating to “safe haven” states. Full compliance—by all fifty states, the District of Columbia, the five principal U.S. territories, and the Indian tribes—is essential to create a true national registry system in the United States. Therefore, in order to realize the key purpose of SORNA, the persistent problem of state noncompliance needs to be acknowledged and addressed.

Cost-related concerns have been a constant factor in all fifty states’ analyses in deciding whether to implement SORNA, and hundreds of millions of dollars have already been invested into establishing these national sex offender registration and notification programs. Since Congress has committed to intervening in the criminal justice system in order to achieve a national registry, it must reevaluate its fiscal approach to SORNA. Specifically, the federal government must take steps to reform the financial structure of the SORNA implementation plan without losing focus of the long-term goal of national compliance.

Politicians have been fighting a war against sexual offenders for years with much passion and determination—but with less attention paid to the details of their battle plan. The problem with SORNA compliance can be resolved with a closer examination of implementation costs and benefits, and with much needed flexibility. It is time to pay the piper and begin changing the tune of the approach to sex offender legislation—for the sake of efficiency, efficacy, and principle.

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168. *Id.* at 52, 59.

169. *See id.* at 88–89 (“With the AWA, federal intrusiveness has reached a high water mark, . . . for instance subjecting certain juveniles to registration and notification and requiring in-person registration verification.”).

170. *See* discussion *supra* Part III.